

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Anthony Pope :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Personal Income Tax :
under Article 22 of the Tax Law :
for the Years 1960 - 1962. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

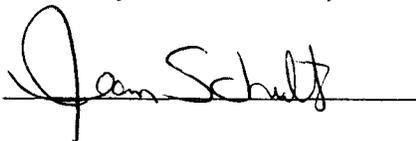
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Anthony Pope, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

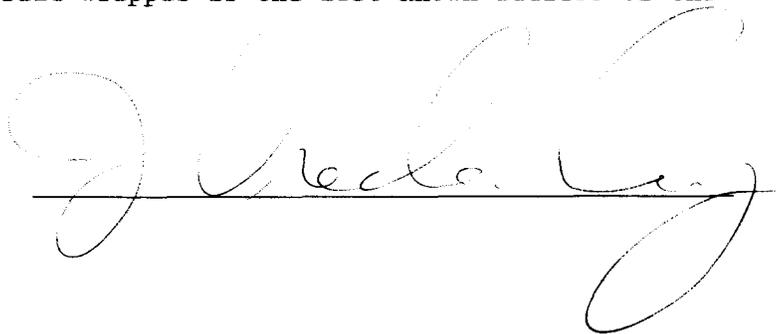
Anthony Pope
11 Dolma Rd.
Scarsdale, NY

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
12th day of December, 1980.





STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Anthony Pope :
for Redetermination of a Deficiency or a Revision :
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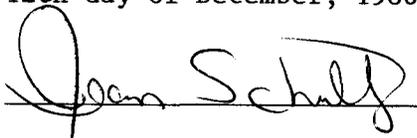
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of December, 1980, he served the within notice of Decision by certified mail upon Herbert M. Haber the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Herbert M. Haber
135 E. 42nd St.
New York, NY

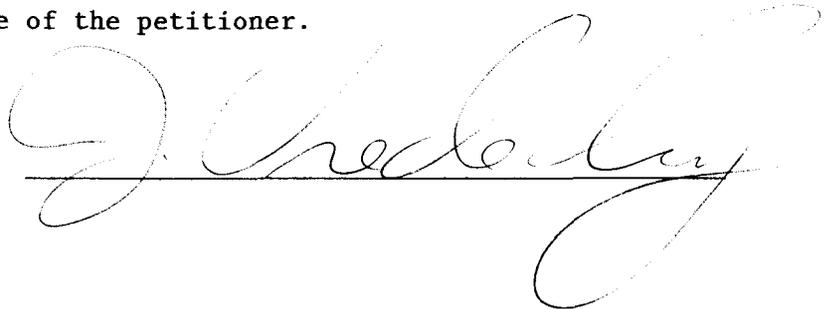
and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
12th day of December, 1980.



Jean Schultz



Jay Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 12, 1980

Anthony Pope
11 Dolma Rd.
Scarsdale, NY

Dear Mr. Pope:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 690 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Herbert M. Haber
135 E. 42nd St.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
ANTHONY POPE : DECISION
for Redetermination of a Deficiency or :
for Refund of Personal Income Tax under :
Article 22 of the Tax Law for the Years :
1960, 1961 and 1962. :

Petitioner, Anthony Pope, 11 Dolma Road, Scarsdale, New York, filed a petition for redetermination of a deficiency issued on December 9, 1964 for the year 1960 in the amount of \$6,559.22, plus interest of \$1,175.87, for a total of \$7,735.09, and (in the alternative) for a refund of \$4,243.08 for 1961 and a refund of \$4,541.68 for 1962, all for personal income tax under Article 22 of the Tax Law (File No. 01881).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, 80 Centre Street, New York, New York, on April 1, 1966 and on November 9, 1967. Petitioner appeared by Herbert M. Haber, Esq.

ISSUES

Whether a deduction is allowed for the return of amounts which had been received in previous years under a "claim of right" and in more particular, (a) whether such loss can be deducted in the year when repayment was made even though petitioner calculated his tax for Federal purposes without such deduction under the provisions of section 1341 of the Internal Revenue Code; (b) whether such a loss, if allowed, would be ordinary or capital in nature so as to be limited to the amount of capital gains plus \$1,000.00; and (c) whether the excess of such loss which is not deducted in the year when incurred can be carried forward and deducted in subsequent years even though the Federal

income tax return for such subsequent years shows only capital gains and no capital losses.

FINDINGS OF FACT

1. In 1955, Anthony Pope and Fortune Pope, who are brothers, individually obtained from Bulk Carriers Corporation, a supplier of salt to the City of New York, contracts for the transportation of salt from points on the waterfront to the various points in the City where the salt would be used for snow removal.

2. The Pope brothers subcontracted the salt transportation contracts to four newly formed close corporations organized by themselves. These corporations were F.A.P. Contractors, Inc., Forn Contractors, Inc., Rona Contractors, Inc. and Anforth Contractors, Inc. These corporations received profits from the New York City contracts. However, these corporations had no equipment of their own. They rented equipment from another corporation wholly owned by the Popes, Empire Sand and Gravel Corp., which in turn rented equipment from a publicly owned corporation, Colonial Sand and Stone Co., Inc., of which the Popes were officers and directors.

3. In 1957, the Popes formed a new corporation, Basic Industries, Inc., which was based in Panama and did business outside of the United States. The business of this corporation was to purchase salt from producers and sell it to Bulk Carriers Corporation, the supplier for New York City.

4. The corporations owned by the Popes, other than Empire Sand and Gravel Corp., were subsequently liquidated. Each of the Pope brothers received liquidating distributions in 1957, 1958 and 1959. On these distributions each one reported the following capital gains: In 1957, F.A.P. Contractors, Inc., \$18,372.57 and Forn Contractors, Inc., \$14,200.00; in 1958, Rona Contractors, Inc., \$16,781.00; in 1959, Anforth Contractors, Inc., \$14,208.08 and Basic Industries, Inc., \$87,195.46. These gains totaled \$150,757.11 to each brother.

5. In 1960, the Pope brothers and Empire Sand and Gravel Corp. were threatened with litigation commenced by the stockholders of Colonial Sand and Stone Co., Inc., claiming a loss of corporate opportunity to Colonial and diversion of profits from Colonial by the Popes, who were its officers, to interests controlled by the Popes. The Popes and Empire agreed to settle this litigation and did settle it in July 1960 by the payment to Colonial of \$405,817.04. This was composed of \$48,435.55 paid by Empire and represented its profits on the salt contracts. The remainder was paid one-half (\$178,690.75) by each of the Pope brothers. This represented the complete profit on the sale of the Basic Industries' shares and the computed net profits before taxes of the four remaining corporations. The profits of said remaining corporations were in each case more than the liquidating profit received by the Pope brothers.

6. Petitioner had filed timely New York tax returns for 1960, 1961 and 1962. In 1960, he had reported capital gains of \$1,497.80. In 1961, he had reported capital gains of \$41,430.74. In 1962, he had reported capital gains of \$58,587.17. (For each of the years 1960 and 1961, petitioner later filed notices of Federal change in income based on additional dividend income. These notices were received on March 12, 1963 and July 24, 1964, respectively and were based on Federal audits dated December 20, 1962 and June 16, 1964, respectively. These are not in issue.)

7. On Federal audit, dated December 20, 1962, petitioner was found to have deficiencies for 1958 and 1959, and a large overpayment for 1960. Said audit found additional income deriving primarily from dividends for two of the years in question. That audit also allowed a recomputation of tax for 1960 under section 1341 of the Internal Revenue Code for the amounts which had been repaid to Colonial. The result of said computation was determined by the limitation of IRC 1341(a)(5)(B) reflecting the elimination of the disputed

income in the years in which it was received, 1957, 1958 and 1959.

7(a). For 1957, the Federal audit eliminated capital gains amounting to \$32,571.57 (\$18,371.57 from F.A.P. Contractors, Inc. and \$14,200.00 from Forn Contractors, Inc.). This resulted in a \$1,000.00 deduction against ordinary income with \$325.33 being available for carryover.

7(b). For 1958, the Federal audit eliminated a capital gain of \$16,781.00 from Rona Contractors, Inc. This also applied the full amount of the 1957 carryover loss.

7(c). For 1959, the Federal audit eliminated capital gains of \$101,403.54 (\$87,195.46 from Basic Industries, Inc. and \$14,208.08 from Anforth Contractors, Inc.). This resulted in a deduction against ordinary income of \$235.16.

8. For 1960, a refund has been granted to petitioner based upon the deduction in 1960 as a long-term capital loss of \$75,378.06, this being one-half of the amount of \$150,756.11, which was repaid in that year. This refund had been computed, however, without respect to the Federal limitation of the deduction of capital losses to only the amount of capital gains shown on the return and ordinary income to the extent only of \$1,000.00. The Notice of Deficiency dated December 9, 1964 recomputes the deduction allowed for the repaid amounts by limiting said deduction to the amount of \$1,497.80, the amount of capital gain shown on the return, plus \$1,000.00 of ordinary income, for a total of \$2,497.80. The claims for refund for 1961 and 1962 are computed on the theory that the deficiency notice for 1960 here in issue is correct for that year, but that the unused capital losses can be carried over to subsequent years. Accordingly, petitioner, having deducted \$1,497.80 against capital gains for 1960 and \$1,000.00 against ordinary income, now applies the remainder of the loss against \$41,430.74 capital gains in 1961 and \$1,000.00 of ordinary

income of that year and further applies the excess against reported capital gains for 1962.

CONCLUSIONS OF LAW

A. That a deduction for the repayment of amounts previously reported as income under a "claim of right" is allowable as a deduction only in the year of repayment (U.S. v. Lewis, 340 U.S. 590; Healey v. Commissioner, 345 U.S. 278). Under the provisions of section 1341 of the Internal Revenue Code, petitioner's 1960 Federal income tax liability was required to be computed using one of two separate methods. The first method allows a deduction in the year of repayment [I.R.C. 1341(a)(4)]; while the second method computes the tax liability without such deduction and subtracts therefrom the decrease in tax from prior years which would result solely from the exclusion of said disputed income from gross income for such prior taxable years [I.R.C. 1341(a)(5)]. Under section 1341 of the Code, the Federal income tax liability is computed using the method resulting in the lowest tax. Petitioner's 1960 Federal liability was computed using the second method provided for in I.R.C. 1341(a)(5). This special computation of tax does not enter into the computation of Federal adjusted gross income or Federal itemized deductions for the year 1960. There is no question, of course, that the special computation of I.R.C. section 1341(a)(5) does not apply to New York since the New York Tax Law contains no comparable provision. This special computation of tax under the Federal Internal Revenue Code, however, does not alter the fact that a deduction would have been allowable under the other applicable provisions of the Internal Revenue Code.

B. That the deduction claimed by petitioner in this case is based upon amounts received in prior years and is necessarily related to such amounts. Since the income when received was capital in nature, the amounts paid out in

the current year must themselves be capital in nature (Arrowsmith v. Comm'r., 344 U.S. 6). The deduction here claimed by petitioner being capital in nature, such deduction is limited by section 1211(b)(1) of the Internal Revenue Code to the amount of capital gains for the year plus no more than \$1,000.00 to be offset against ordinary income.

C. That under the Federal conformity provisions of section 612 of the Tax Law no capital loss carryover is allowed for the tax years 1961 and 1962, since no capital loss carryover could be or were considered in arriving at adjusted gross income for Federal purposes.

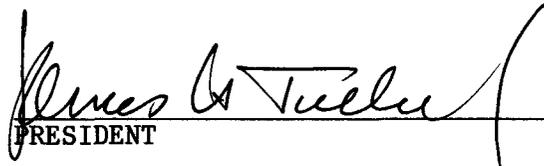
D. That the Notice of Deficiency for the year 1960, dated December 9, 1964, was not timely issued within the provisions of section 683 of the Tax Law.

E. That the petition of Anthony Pope for refunds for 1961 and 1962 is denied and the Notice of Deficiency issued December 9, 1964 is cancelled.

DATED: Albany, New York

STATE TAX COMMISSION

DEC 12 1980


PRESIDENT


COMMISSIONER


COMMISSIONER

TA 26 (9-79)
STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

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600
New York, NY
10014

Herbert M. Haber
135 E. 42nd St
New York, NY

RECEIVED
DEC 22 1988
TAX APPEALS BUREAU

NOT DELIVERED
ADDRESS
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REF. COPY

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

December 12, 1980

Anthony Pope
11 Dolma Rd.
Scarsdale, NY

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NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Herbert M. Haber
135 E. 42nd St.
New York, NY
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
ANTHONY POPE
for Redetermination of a Deficiency or
for Refund of Personal Income Tax under
Article 22 of the Tax Law for the Years
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DECISION

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C. That under the Federal conformity provisions of section 612 of the Tax Law no capital loss carryover is allowed for the tax years 1961 and 1962, since no capital loss carryover could be or were considered in arriving at adjusted gross income for Federal purposes.

D. That the Notice of Deficiency for the year 1960, dated December 9, 1964, was not timely issued within the provisions of section 683 of the Tax Law.

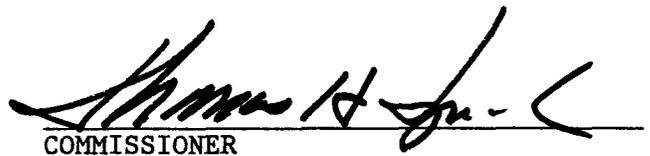
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DATED: Albany, New York

STATE TAX COMMISSION

DEC 12 1980


PRESIDENT


COMMISSIONER


COMMISSIONER